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SUMMARY

Moonbeam has failed to meet its burden that it was financially qualified when the application was filed. It had pending two applications and had insufficient resources to build both. Moonbeam has likewise failed to meet its burden that it is presently financially qualified, or that it was financially qualified when it amended its application on March 2, 1992. There is no evidence to demonstrate that funds were actually on hand other than the self-serving testimony of Ms. Constant. Commission precedent requires more. Moonbeam has also failed to demonstrate that it has reasonably calculated its costs and that it has sufficient resources to meet those costs. Important expense items were omitted from its cost estimates. Moonbeam failed to estimate legal expenses yet to be incurred and has failed to show how it will pay over \$31,000 in legal fees it still owes. Finally, Ms. Constant's testimony is not credible. She was evasive and nonresponsive. More significantly, she demonstrated a lack of candor.

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BEFORE THE

Federal Communications CommissionFEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

WASHINGTON, D.C. 20554

In re Applications of

MM DOCKET NO. 93-42

MOONBEAM, INC.

File No. BPH-911115MG

GARY E. WILLSON

File No. BPH-911115MO

For a Construction Permit
New FM Station on Channel 265A
in Calistoga, CaliforniaTO: The Honorable Edward Luton
Administrative Law Judge**REPLY FINDINGS AND CONCLUSIONS OF
GARY E. WILLSON ON THE MOONBEAM, INC. FINANCIAL ISSUES**

Gary E. Willson (Willson) files his reply to the Proposed Findings of Fact and Conclusions of Law of Moonbeam, Inc. Willson utilizes numerous subheadings below in an effort to identify and respond to, with minimum repetition, Moonbeam's various conclusions.

I. MOONBEAM'S NOVEMBER 12, 1991 CERTIFICATION.**A. The August 30, 1991 Balance Sheet.**

Ms. Constant, at the time she certified her application, relied on her own funds. Moonbeam relies on the balance sheet prepared by Ms. Constant dated August 30, 1991 to demonstrate she had available net liquid assets in excess of liabilities to meet projected expenses of \$95,000. Moonbeam Ex. D. Moonbeam has failed to meet its burden.

1. The Balance Sheet is Woefully Inadequate.

The balance sheet does not itemize current assets or liabilities and, as noted below, omits at least one major

significant current liability. Moonbeam Ex. D. It does not list long-term liabilities, and it is not prepared in accordance with standard accounting procedures. FCC Form 301 requires applicants to prepare financial statements, "in accordance with generally accepted accounting principles." FCC Form 301, p. 5. FCC Form 301 also requires that for each person who has agreed to furnish funds there must be a balance sheet or financial statement showing "all liabilities and liquid assets sufficient to meet current liabilities." FCC Form 301, p. 7. See also Central Florida Communications Group, Inc., 8 FCC Rcd. 4128 (Rev. Bd. June 18, 1993) (financial statement rejected because "the financial statement, itself, is in large part conclusiary. It does not identify the assets or substantiate the validity of the asserted values or the ready convertibility").

**2. The Balance Sheet Fails to Include
a \$125,000 Current Liability.**

Ms. Constant also failed to include the \$125,000 projected cost to construct and operate Moonbeam's then pending Eagle, Idaho application. Applicants are required to have sufficient funds to construct the facilities proposed in all pending station applications. Welch Communications, Inc., 7 FCC Rcd. 4542, 4547 (1992); Isis Broadcasting Group, 7 FCC Rcd. 5125 at n. 38 (Rev. Bd. 1992); Breeze Broadcasting Company, L.P., 8 FCC Rcd. 1835, 1837 (Rev. Bd. 1993); Playa del Sol Broadcasters, 8 FCC Rcd. 7027 (Rev. Bd. 1993); and Texas Communications Limited Partnership, 5 FCC Rcd. 5876, 5878 (Rev. Bd. 1990). Indeed, as noted by the Review Board in Breeze Broadcasting Company, supra,

at ¶13, "the applicant here bore the burden of showing that he was able to meet all his other outstanding financial commitments and the present broadcast financial proposal." Had the Eagle, Idaho liability been included, Ms. Constant would have had less than \$28,000 (\$153,000 minus \$125,000) available to meet her projected costs of \$95,000 to construct and operate the Calistoga station.

Moonbeam argues that a settlement agreement to dismiss the Eagle, Idaho application was filed in July 1991; that Ms. Constant was advised by counsel that the settlement would be approved; and that Moonbeam had no further intention of prosecuting its Eagle, Idaho application. Moonbeam F&C ¶¶6,7. Record evidence, however, indicates that, by letter dated November 13, 1991, just days before the Calistoga application was filed, the FCC advised the parties not to expect any action on the settlement until the end of December. See Willson F&C Addendum 1. Moonbeam never advised the FCC by amendment or otherwise that it had no intention of further prosecuting its Eagle, Idaho application. See Welch Communications, Inc., 7 FCC Rcd. 4542, 4547 (Rev. Bd. 1992) (there is a clear obligation to report, if on filing a second application, an applicant has insufficient funds to construct both pending applications). Indeed, dismissal of the Eagle, Idaho application was contingent on approval of the settlement agreement. Finally, and most significantly, the Commission has consistently rejected similar "no-intention-to-build" type arguments. In Breeze Broadcasting, supra, there was even less likelihood that the applicant would be required to

build the numerous stations that it applied for. Yet the Commission required the applicant to demonstrate its financial ability to construct each and every one of the facilities.

B. Moonbeam Failed to Meet Its Burden That It Had Available Liquid Assets.

Moonbeam asserts that it is "unrefuted that, on both certification dates, Ms. Constant knew she had sufficient liquid assets." Moonbeam F&C ¶37. On the contrary, Ms. Constant could not have known there were sufficient liquid assets if such assets were, in fact, not available. It was Moonbeam's burden to establish its financial qualifications.

Ms. Constant relies only on her own testimony to demonstrate she had available sufficient liquid assets on hand. The Commission has concluded that such self-serving testimony is not adequate. See Central Florida Communications Group, 8 FCC Rcd. 4128 (released June 18, 1993); Aspen FM, Inc., 6 FCC Rcd. 1603 (1991); Northhampton Media Associates, 4 FCC Rcd. 5517, 5519 (1989). The Alex Brown & Sons account statements were not offered for the truth of the matter asserted, but only for the proposition that Ms. Constant "believed" that the funds were available (Tr. 305). A belief that funds are available does not establish that they are.

C. Cost Estimates.

Moonbeam claims it reasonably calculated its costs and, as such, has met its burden on the financial issue. Moonbeam F&C ¶32. It has not.

1. Significant Omitted Cost Items.

Moonbeam has omitted significant and material cost items from its budget:

i. Studios. Ms. Constant testified that she planned to construct a studio building in Calistoga (Tr. 133). She also testified there would be an auxiliary studio in Santa Rosa (Tr. 86). The budget does not include any provision for constructing a main studio or for an auxiliary studio in Santa Rosa. Moonbeam Ex. F. Even if Ms. Constant intends to lease studio space, no money has been set aside for building renovation.

ii. Personnel. Ms. Constant testified that she intended to employ three full-time personnel and a part-time engineer, and possibly other part-time personnel (Tr. 129, 160). Mr. Klein's construction and operating budget, however, on which Ms. Constant based her cost estimates, only provides for three part-time personnel and one full-time employee, and no provision was made for the cost of an engineer. Moonbeam Ex. E, Tr. 132.

iii. Legal Fees. Moonbeam's cost estimates do not adequately provide for legal fees. Since Moonbeam has not been paying its legal fees on a current basis, it has the burden of demonstrating not only the amount of those fees, but its ability to pay the fees. Weyburn Broadcasting Limited Partnership v. FCC, 71 RR2d 1386, 1392 (DC Cir. 1993). Moonbeam's claim that it has been paying legal fees on an ongoing basis is not true. It has not been current on payment of legal fees since November 1992, and currently owes in excess of \$31,000 for legal fees as of

October 1993 (Tr. 377). This represents over half the total legal fees billed and more than the \$30,000 budgeted (Tr. 378).

Moonbeam attempts to position itself as an applicant that has been paying its legal fees on an ongoing basis and that it, therefore, does not need to account for anticipated legal expenses. It is hard to imagine any creditor that would consider an account current that is \$31,000 in arrears and has been in arrears for over a year. Moonbeam owes more than half the legal fees it has incurred. Under the circumstances, Moonbeam can hardly be considered to be paying on an ongoing basis.¹

Moonbeam's next claim is that it has paid its legal expenses over the original estimate of \$30,000 and that, therefore, if Moonbeam is awarded a construction permit, its budgeted amount for legal expenses will be sufficient. Moonbeam F&C ¶47. There are a myriad of problems with this thinking. Moonbeam already owes over \$31,000 -- more than what has been budgeted. That amount is only for services through October 1993, before other significant additional legal fees were incurred for the hearing on the financial issue, for preparation of findings and conclusions, and for other anticipated future legal expenses.

¹ Moonbeam cites Port Huron Family Radio, 5 FCC Rcd. 4562, 4563 (1990) for the proposition that if legal expenses are paid on an ongoing basis they are not relevant to an applicant's financial qualifications. Moonbeam F&C ¶46. However, the Court of Appeals in Weyburn, specifically noted, "in those cases [Port Huron Family Radio], the FCC permitted financial plans that did not include legal fees and other prosecution expenses but expressly noted that they were paid as incurred. Here, legal fees were in arrears." Id. at n. 1. It is indisputable that Moonbeam is not only in arrears, but significantly in arrears. Therefore, the precedent cited by Moonbeam is unavailing.

It is also as plausible to conclude that Moonbeam has already paid the \$30,000 budgeted and did not anticipate or budget spending any additional funds on legal fees and cannot do so.

II. THE MARCH 2, 1992 AMENDMENT.

Moonbeam has failed to meet its burden of demonstrating that it was financially qualified at the time it amended its application on March 2, 1992. Moonbeam relies solely on its claim that its amendment was technical in nature, and on Ms. Constant's self-serving testimony that there was no change in her financial condition. Moonbeam F&C ¶18. Nowhere in its amendment does Moonbeam indicate the financial amendment was a clarification as opposed to a new financial proposal. In fact, at her deposition Mary Constant demonstrated a total lack of knowledge concerning the purpose and intent of Moonbeam's March 2 amendment (Tr. 80-81). Moonbeam's showing is deficient for the following reasons:

A. No Financial Statement.

Moonbeam has failed to provide a balance sheet (even a reconstructed balance sheet) within three months of its new financial certification filed on March 2, 1992. An issue was added to determine whether Moonbeam was financially qualified when it filed its March 2, 1992 amendment. Moonbeam claims that its intended source of financing never changed. Even if this is true, Moonbeam is still required to affirmatively demonstrate its financial qualifications at that time in order to meet its burden that it was financially qualified as of March 2, 1992. This it has not done.

B. No Cost Documentation.

Among other things, Moonbeam's March 2, 1992 amendment proposed a new site. Moonbeam provided no cost documentation reflecting this change.

III. CURRENT FINANCIAL QUALIFICATIONS.

Moonbeam has failed to meet its burden of establishing that it is currently financially qualified.

A. Financial Qualifications as of the Date of Hearing

Moonbeam relies on \$90,000 it claims was deposited in the Moonbeam checking account just prior to hearing to demonstrate its current financial qualifications (Tr. 359). No corroborative evidence was offered other than Ms. Constant's self-serving testimony. The amount deposited is also \$5,000 less than the \$95,000 projected cost.

Moonbeam also fails to demonstrate it has sufficient assets to deal with its current liabilities and, for that matter, neglects to even identify those liabilities. One of the sizable identified current liabilities of over \$31,000 is for legal fees as of the end of October 1993. This amount is over the \$30,000 amount budgeted and no provision has been made for additional legal fees for the hearing in November and for other ongoing legal services, such as the preparation of findings and conclusions. Ms. Constant has also failed to provide a balance sheet as of 90 days of the date of the hearing or any other evidence for that matter. Her current financial condition as of the date of the hearing is therefore unknown.

B. The June 30, 1993 Financial Statement.

Moonbeam submitted the balance sheet of Mary Constant dated June 30, 1993 purporting to reveal net liquid assets of \$400,000. It turns out the financial statement is inaccurate, misleading, and therefore totally unreliable.

1. The Crop Loan.

The financial statement failed to report a \$546,000 liability (crop loan) which was incurred just weeks prior to the June 30 financial statement. (Willson Ex. A)(Tr. 348,349.) Ms. Constant neglected to report \$51,319 of current liabilities associated with that obligation. Id. See Heidi Damsky, 8 FCC Rcd. 6242 at ¶21 (Rev. Bd. released August 31, 1993) (failure to list liabilities raises material questions whether applicant lacks candor). She then gave misleading testimony intended to communicate that the loan was a liability which would shortly be paid off within the growing season, and was therefore of no consequence (Tr. 320,330). It turned out, however, that the crop had already been harvested and sold and that the loan was not paid off (Tr. 352). Ms. Constant then, on cross-examination, also admitted that she had decided to pay off the loan on a monthly basis (Tr. 352).

2. Ownership of Funds.

Mary Constant testified that the funds in the Alex Brown accounts, including those listed in the June 30 financial statement, were her funds alone (Tr. 315). It turned out, however, that her funds in at least one of the Alex Brown accounts listed in the June 30 financial statement were co-mingled with her

husband's funds (Tr. 362). Over \$125,000 in the account represented her husband's share of the proceeds from the sale of their Nicasio residence (Tr. 362).

3. The Balance Statement is Infirm.

The June 30, 1993 financial statement suffers from the same infirmities as Ms. Constant's August 30, 1991 financial statement. See, supra, pp. 1,2.

4. Tax Liability.

There is significant tax liability which has been unaccounted for in Ms. Constant's June 30, 1993 balance sheet. The Constants sold their Nicasio home in 1993 and purchased their Calistoga residence shortly thereafter (Tr. 352,353). Ms. Constant admitted she made a capital gain on the sale of the house (Tr. 353). When a capital gain is made on the sale of a residence and a new residence is purchased thereafter, the gain remaining after purchase of the new residence is taxable that year. 26 U.S.C. 1034(a). It is up to Moonbeam to affirmatively demonstrate that this liability has no material impact on Ms. Constant's financial qualifications. See Las Americas Communications, Inc., 101 FCC2d 729, 731 (Rev. Bd. 1985). It has not done so.

C. The Liens.

Moonbeam has failed to meet its burden of demonstrating that it was financially qualified during the pendency of two liens filed against Ms. Constant.

1. The Tax Lien.

Ms. Constant was the subject of an approximately \$15,000 lien filed against her residence for failure to pay taxes. This lien was filed on December 8, 1992 (Tr. 317,372). Ms. Constant has failed to demonstrate that during the pendency of this lien she was financially qualified. Las Americas, supra.

2. The Mechanics Lien.

Ms. Constant failed to disclose yet another lien. In fact, Ms. Constant testified that she was certain there were no other liens (Tr. 373). However, a mechanics lien in the amount of \$2,341 was filed against Mary Constant in 1993. Willson Ex. C. Again, Moonbeam failed to demonstrate it was financially qualified during the pendency of this lien. Las Americas, supra.

IV. FALSE CERTIFICATION.

Moonbeam argues that the certification issue must be "dismissed" since it was financially qualified to construct and operate the station. Moonbeam F&C ¶32. As noted above, though, this is not so. Perhaps sensing its tenuous position, Moonbeam argues that, in order to find that the application was falsely certified, "Moonbeam must be found to have 'consciously intended' to deceive the Commission with respect to the qualifications at issue." Moonbeam F&C ¶30. It is not the self-serving statement of Ms. Constant that she believes she was financial qualified that controls, but the record evidence. See Capital City Broadcasting Company, 8 FCC Rcd. 1726, 1734 (1993) ("intent is a factual question that, like other factual questions can be found from the evidence affording reasonable inference"). As detailed

above, the record reveals that Moonbeam was not and is not financially qualified.

Furthermore, and relevant to the false certification issue, is the fact that Mary Constant's testimony was not credible. She was unresponsive and evasive at both the November and July hearing sessions. See e.g., Tr. 367, 378, 73, 83, 109.

As also noted in Willson's Findings and Conclusions, Ms. Constant made misrepresentations and demonstrated a lack of candor in testimony on the financial issue. See Richardson Broadcast Group, 7 FCC Rcd. 1583 (1992) ("while many of the matters about which Younts was either evasive or deceptive individually may be of little moment, collectively they demonstrated a pattern of evasiveness and false testimony clearly indicating a willingness to deceive the Commission to gain a perceived advantage"). See also Emission de Radio Balmeseda, Inc., 7 FCC Rcd. 3582, 3588 (Rev. Bd. 1992) ("although the Commission in some circumstances has shown leniency toward applicants that have been less than candid, more recently, 'the Commission's demand for absolute candor [has] itself [been] all but absolute'"). She provided a June 30, 1993 financial statement which, it turns out, was totally inaccurate. She gave misleading testimony on the sizable \$546,000 crop loan. She has, throughout the proceeding, made different statements concerning legal fees and how they would be paid -- statements which were inconsistent but which suited her needs at the time. See Las Americas Communications, Inc., 6 FCC Rcd. 1507, 1510, ¶22 (1991) (pleadings reflected a disturbing pattern of concealment and half

truths raising a substantial and material question as to whether the applicant had breached his duty of candor). She failed to disclose a \$15,000 tax lien and then testified she was certain there were no other liens when, in fact, there were.

Moonbeam's reliance on Georgia Public Telecommunications Commission, 7 FCC Rcd. 2942 (Rev. Bd. 1992) is totally unavailing. There, the Review Board found that an applicant had not falsely certified its application. The Review Board, however, noted the unique circumstances of the case. The Board noted that the applicant had relied in good faith on Sonrise Management Services and its counsel, which were found to have engaged in fraudulent activity. Because of this, the Board bent over backwards for what it perceived was an innocent victim. The Board also noted the numerous independent actions taken by the applicant to assure the applicant's financial viability.² In Moonbeam's case, there are no extraordinary circumstances and, far from demonstrating good faith, Ms. Constant has demonstrated she is not a credible witness, and lacks candor.

² The Commission in affirming the Review Board noted the unique circumstances, "We agree with the Review Board that this is an extraordinary proceeding in that Johnson engaged in serious and reasonable efforts to ensure that JBI was financially qualified at the time of certification, but was nonetheless duped by individuals who apparently developed an elaborate scheme for defrauding innocent investors. Furthermore, when Johnson realized that, due to circumstances entirely beyond his control, JVI's financial resources might be questionable, he quickly took steps to obtain adequate substitute financing." Georgia Public Telecommunications Commission, 7 FCC Rcd. 7996, 7999 (1992).

V. CONCLUSION.

Moonbeam has failed to meet its burden that it was financially qualified when the application was filed. It had pending two applications and had insufficient resources to build both. Moonbeam has likewise failed to meet its burden that it is presently financially qualified, or that it was financially qualified when it amended its application on March 2, 1992. There is no evidence to demonstrate that funds were actually on hand other than the self-serving testimony of Ms. Constant. Commission precedent requires more. Moonbeam has also failed to demonstrate that it has reasonably calculated its costs and that it has sufficient resources to meet those costs. Important expense items were omitted from its cost estimates. Moonbeam failed to estimate legal expenses yet to be incurred and has failed to show how it will pay over \$31,000 in legal fees it still owes. Finally, Ms. Constant's testimony is not credible. She was evasive and nonresponsive. More significantly, she demonstrated a lack of candor.

WHEREFORE, it is respectfully requested that Moonbeam's application be denied.

Respectfully submitted,

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GARY E. WILLSON

By 
A. Wray Fitch III
His Attorney

February 16, 1994

CERTIFICATE OF SERVICE

I, George D. Culver, in the law offices of Gammon & Grange, P.C., hereby certify that I have sent, this 16th day of February 1994, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing REPLY FINDINGS AND CONCLUSIONS OF GARY E. WILLSON ON THE MOONBEAM, INC. FINANCIAL ISSUES to the following:

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